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In the Matter of

Digital Performance Right in Sound
Recordings and Ephemeral Recordings
Rate Adjustment Proceeding

Docket No. 99-6 CARP DTRA

ORDER

COPYRIGHT
OFFICE

Copyright
Arbitration
Royalty
Panels

This Order disposes of the two motions pending before the Office in this proceeding. The first motion, filed on November 23, 1999, by the Recording Industry Association of America, Inc. ("RIAA") requests an extension of the date for filing direct cases. The second motion, filed on December 3, 1999, on behalf of RadioWave.com, Inc. ("RadioWave"), asks the Office to accept a notice of intention to participate in the above-captioned proceeding that was filed after November 1, 1999, the date specified in the **Federal Register** for making such filings.

A. Motion to Accept Post-November 1, 1999 Filing of Notice of Intention to Participate

RadioWave states that it filed its motion to accept a post-November 1, 1999, filing of its Notice of Intention to Participate once it became aware of its need to make such a filing in order to participate in the above-captioned CARP proceeding. It asserts that acceptance of its notice at this point in the proceeding will not cause disruption to the proceeding nor will it cause prejudice to any party or entity participating in the proceeding. The only party to file a response to the motion was RIAA, and it has agreed not to object to RadioWave's motion "[b]ecause no party has opposed [its] November 23, 1999 motion to extend the time for filing direct cases."

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The Office evaluates each late-filed pleading under a two-part test: 1) the disruption to the proceeding caused by allowing the moving party to participate; and 2) good cause for accepting the late-filed pleading. Orders, in Docket No. 99-6 CARP DTRA (November 30, 1999) and Docket No. 99-3 CARP DD 95-98 (August 5, 1999). The current motion to accept the post-November 1, 1999, filing presents the same issues discussed in the November 30, 1999, Order in which the Office granted seven motions to accept late-filed Notices of Intention to Participate in this proceeding. Because no additional arguments for denying RadioWave's motion have been made, the Office is granting the motion for the reasons stated in the November 30, 1999, Order.

B. Motion to Extend Time for Filing Direct Cases

On November 23, 1999, RIAA filed a motion with the Copyright Office in which it requested a postponement of the initiation of the 45-day precontroversy discovery period, announced previously in the **Federal Register** on September 27, 1999. See 64 FR 52107. RIAA proposes an extension of the deadline for filing direct cases from January 18, 2000, to April 17, 2000, with all dates for discovery to be set accordingly.

RIAA offers the following reasons for adopting the proposed schedule: 1) the proceeding raises novel legal and evidentiary issues never before addressed by the Copyright Office or a CARP; 2) the proceeding will set rates and terms under a new statutory license that will apply to a relatively new industry; 3) the number of parties seeking to participate in the proceeding exceed the largest number of participants in any past proceeding; 4) the proposed schedule will allow RIAA more time to negotiate with the identified parties, which in turn, may reduce the scope of the proceeding in the event additional agreements are reached; 5) the additional time would allow RIAA much needed time to coordinate with its over 2,000 members in the preparation of its direct case; 6) the adoption of the proposed schedule will not interfere with any previously scheduled CARP proceedings; and 7) the grant of additional time may allow the Copyright Office and the participants to identify additional ways to simplify the process to ensure that the CARP can fulfill its statutory mandate within the 180-day period.

The Copyright Office received three responses to the RIAA motion--two joint responses and a single response from Yahoo! Inc.¹ None of the responses opposed RIAA's request to extend the time for filing direct cases in this proceeding.

The Webcasters and Broadcasters Group, however, did state that it "would be prepared, as authorized by § 114(f)(2)(B) of the Copyright Act, to discuss with the other participants in this proceeding and with the Copyright Office an extension of the December 31, 2000 end date for the applicability of the forthcoming CARP ruling." The Webcasters and Broadcasters Group then proposed moving the meeting scheduled for January 10, 2000, to an earlier date in December in order to discuss all scheduling issues related to the upcoming proceeding. AMFM/CCC support this proposal but the RIAA does not.

Discussion

The Copyright Office has received and accepted more than forty Notices of Intention to Participate, including the RadioWave filing. The vast majority of these parties have no experience with the CARP process. For this reason alone, the Office finds that it is in the best interest of all parties to vacate the current schedule and reset the dates for the 45-day precontroversy discovery period. The Office will issue a new schedule shortly after the January 10, 2000, meeting.

The Office has also considered the Webcasters and Broadcasters Group's proposal to move the date of the meeting up and determined that it would be unreasonable to make a change at this time. The Office specifically chose a date in January in order to provide ample time for all parties to make arrangements to have their interests represented at the

¹ The Walt Disney Company, ABC, Inc., CBS Corporation, MTV Networks, a division of Viacom International Inc., Tunes.com Inc., Rolling Stone Radio, Cdnw Online, Inc., NetRadio Corporation, Launch Media, Inc., The Eclectic Radio Company, LLC, Westwind Media.com Inc., American Broadband Productions, LLC, AEI Music Network, Inc., Everstream, Inc., RadioActive Media Partners, Inc., BET.com, LLC and RadioWave.com, Inc. (the "Webcasters and Broadcasters Group") filed one joint response. AMFM, Inc. and Clear Channel Communications, Inc. ("AMFM/CCC") filed the second one.

meeting, and assuming that schedules have been set accordingly, the Office will not ask the parties to readjust their calendars. It would have been necessary to schedule a meeting prior to January 10, 2000, only if the parties were expected to file their direct cases by January 18, 2000. Since that is no longer the case, there is no urgency to readjust the date of the meeting.

The purpose of this initial meeting will be to discuss the procedural issues associated with a CARP proceeding, including but not limited to a discussion of the discovery process. In preparation for this meeting, the Office has sent each party an updated copy of the regulations governing these proceedings. Any questions regarding these regulations should be raised at the meeting.

In addition, the Office would like to use this opportunity to discuss the RIAA proposed schedule with the parties, particularly in light of the fact that the Office will be publishing during the first week of January another notice to initiate voluntary negotiations for the purpose of setting new rates and terms for the section 112 and section 114 licenses for the period between January 1, 2001, to December 31, 2002. See 17 U.S.C. §§ 112(e)(7) and 114(f)(2)(C). Under the statutory scheme, CARP proceedings to decide these rates and terms could begin as early as September, 2000. The Office wishes to avoid convening a new CARP to determine the 2001-2002 rates and terms that would commence before the CARP proceedings for the 1999-2000 rates and terms have concluded. At the January 10 meeting, the parties should be prepared to discuss whether the current CARP should determine rates and terms for a period extending beyond December 31, 2000, e.g., to December 31, 2001, or December 31, 2002. See 17 U.S.C. §§114(f)(2)(A) and 114(f)(2)(C)(i)(II).

Because of the interrelationship between the scheduling of the current proceeding and the scheduling of the CARP to determine rates and terms for 2001 and 2002, the Office is denying, without prejudice, that part of the RIAA motion that requests that the deadline for filing direct cases be rescheduled for April 17, 2000, and that all dates for discovery be rescheduled accordingly. The new dates will be determined following the January 10 meeting. At present, the Office will simply vacate the current dates.

Wherefore, **IT IS ORDERED** that the motion to accept the post-November 1, 1999, filing of RadioWave's Notice of Intention to Participate **IS GRANTED**.

Wherefore, **IT IS FURTHER ORDERED** that the motion to extend time for filing direct cases **IS GRANTED IN PART AND DENIED IN PART**, and that the precontroversy discovery schedule and its procedural dates announced in the September 27, 1999, notice **ARE VACATED** until further notice.

SO ORDERED.



David O. Carson,
General Counsel.

Dated: December 22, 1999.